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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 197

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Appellants.

vs.

CAROLINA FREIGHT CARRIERS CORPORATION,
Appellee.

BRIEF IN BEHALF OF THE IRREGULAR ROUTE COMMON CARRIER CONFERENCE OF THE AMERICAN TRUCKING ASSNS., INC.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA.

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Foreword.

Undersigned counsel present this brief as *amici curiae* in the interest of the Irregular Route Common Carrier Conference of the American Trucking Assns., Inc. That Conference is composed of a large number of common carriers by motor vehicle engaged in the transportation

of general commodities over irregular routes.[1] Many of its members have pending before the Interstate Commerce Commission applications under the "grandfather" clause similar to that of appellee. Consequently, the Conference is vitally interested in the questions of statutory construction and application involved in this case, although not in the precise scope of the certificate to which appellee may be entitled.

QUESTIONS PRESENTED.

The briefs of neither the Government nor of the Commission state with accuracy and completeness the underlying questions on which must turn the validity of the Commission's order. The brief of the Commission states the questions presented as if they involved nothing more than the existence of substantial evidence. (Com. Br. pp. 2-4) The brief of the Government states the questions presented as if restricted to the disregard by the Commission of the evidence relating to appellee's holding itself out as a common carrier of general freight throughout a territory along the Atlantic seaboard. (Gov. Br. p. 2)

There is, however, no need for the Court to examine the evidence before the Commission, except as may be necessary to illuminate the real questions in the case which are purely questions of law. The actual questions presented are:

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[1] "Many operators, particularly common carriers, have regular routes, but many more do not, and there are **thousands** who go **anywhere** for hire, at least **within a specified territory** • • •" Fourth Report, Federal Coordinator of Transportation (House Doc. 394, 74 Cong., 2d Sess., January 21, 1936, pp. 26-27); (emphasis ours).

1. Does the report contain preliminary findings to support the final conclusion of the Commission which limits the future business of appellee to much less than the operations conducted on and since the "grandfather" date in the natural and normal course of business consistent with appellee's[2] holding out.

2. Is there *any* evidence to support a finding that the service actually rendered on the statutory date fixed the precise limits of the undertaking of the appellee as a common carrier.

3. Does the statute authorize the Commission to disregard the general character and type of business carried on by appellee on June 1, 1935, and to limit the scope of a certificate sought under the "grandfather" clause of Section 206 (a) of the Motor Carrier Act, 1935 (U. S. C. Supp. V, Title 49, Sec. 306(a)), to the precise points actually served on and since June 1, 1935, and, as to each such point, to the precise commodities transported therefrom or thereto in the same period. A subordinate question here is as to whether or not Congress intended to give the accepted meaning of the common law to the term "bona fide operations as a common carrier," as used in Section 206 (a) of the Motor Carrier Act, 1935.

4. Does the statute authorize the Commission to apply a different test in determining the extent of the bona fide operations of a common carrier over irregular routes within a territory than it applies in determining the extent of the bona fide operations of a common carrier operating between fixed termini over regular routes.

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[2] When referring to the "grandfather" date, we use the term "appellee" as including its predecessors in interest.

STATUTES INVOLVED.

The relevant provisions of Motor Carrier Act, 1935, in effect on the date of the Commission's order, July 10, 1940, and as amended by the Transportation Act, 1940, are set forth in the Appendix, *infra*, pp. 43-47.

STATEMENT.

We offer our own statement of the case to separate the facts which are directly material to the questions presented from the facts which constitute only descriptive background. In the latter category fall facts which relate to the routine of the proceedings and to findings made by the Commission which bear upon the issues presented only indirectly. These are fully covered in the briefs of the appellants and will not be repeated.

The facts which are to be considered in determining whether or not the Commission acted beyond the authority conferred upon it by the statute are as follows:

1. *The report of the Commission.* The Commission notes (R. 10) the contention of appellee that prior to June 1, 1935, and since, it has held itself out to the general public to transport general commodities throughout a strip of territory along the Atlantic seaboard extending between North Carolina on the south and the New England states on the north. (The proof on which this contention rests is found at R. 44, T. 86; R. 60, T. 114; R. 77-81, T. 145-152; R. 82-83, T. 155; R. 84, T. 158; R. 94, T. 176; R. 98, T. 183; R. 127-139, T. 236-258.)[3] The

[3] To facilitate identification of evidence we give reference to both the pages of the printed transcript (R.) and to the pages of the original transcript (T.).

Commission makes *no* finding of fact in disposition of this contention, except as to the origin territory for cotton yarn (R. 9), although the Commission does find that appellee's operations were performed for the public generally and that it was and is a common carrier. (R. 8)[4]

Nor does the report contain *any* finding that the operations generally conducted throughout the territory *were or are inconsistent* with the holding out claimed by appellee. The only finding, either affirmative or negative, addressed to the matter of consistency between operations conducted and the holding out is an affirmative finding in the ninth paragraph of the report restricted to the origin territory for cotton yarn. (R. 9) The finding in the twelfth paragraph of the report (R. 10) "that no substantial showing of service has been made to establish bona fide irregular route operations in the transportation of general commodities from and to *all points* in the states included in the application," is not a finding directed to the consistency between operations conducted and the holding out, particularly as to general commodities to be transported to and from the general territory in the south and the general territory in the north between which the Commission does recognize appellee as a common carrier as to certain specified commodities.

In the twelfth paragraph of its report, the Commission finds in effect that to give effect to the contention of appellee as to its holding out would occasion congestion of highways, destructive rate practices, and unbridled competition, these being characterized as the ills which regulation was designed to alleviate. (R. 10) There was, however, not a syllable of evidence before the

[4] The printed transcript garbles the report of the Commission (24 M. C. C. 505), at this point.

Commission relating to such ills nor as to how the grant of the certificate sought to appellee would affect them.

In the same paragraph the Commission suggests that under the statute it should apply a different test in determining the bona fide operations as a common carrier of one operating over irregular routes than in the case of operating over regular routes. (R. 10)

In the thirteenth paragraph of its report, the Commission finds that Sections 206(a) and 209(a) should be construed as meaning that the undertaking of a common carrier within a territory should be considered as limited by the service actually rendered on and since the "grandfather" date. This legal principle, rather than the matter of substantial evidence or of the weight to be given to the evidence, controlled the ultimate conclusion of the Commission in which is specified the transportation services to which appellee will be limited in the future if the order stands.

The following summary of the authority granted in fourteenth paragraph of the report (R. 10-11), divided as between directions, indicates the nature of the business to which appellee will be confined if the order of the Commission is sustained.

Northbound: (1) Cotton yarn from twelve specified counties in North Carolina to all points in Pennsylvania on and east of highway U. S. 11, to all points in eight counties in northern New Jersey, and to four additional specified destinations in Maryland, New York, and Rhode Island (Hagerstown, Md., New York, N. Y., Pawtucket and Providence, R. I.): (2) Asbestos textile products from Charlotte, N. C., to twelve specified destinations in Pennsylvania, New Jersey, New York, Connecticut, Rhode Island, and Massachusetts (Philadelphia and North

Wales, Pa., Trenton, Newark, Passaic and Paterson, N. J., New York, N. Y., Middletown, Conn., Providence and Pawtucket R. I., and Boston and Hudson, Mass.); (3) Empty spools and boxes from Charlotte, N. C., to two destinations in New Jersey (Harrison and Perth Amboy).

Southbound: (1) Supplies and materials used in the manufacture of asbestos textile products from Harrison and Perth Amboy, N. J. to Charlotte, N. C.; (2) Petroleum products from Sewaren, N. J., and Marcus Hook, Pa., to all points in North Carolina, and to Columbia and Greenville, S. C.; (3) Linoleum from Paulsboro, N. J., Marcus Hook, Pa., and East Walpole, Mass., to all points in North Carolina, and to Spartanburg and Greenville, S. C.; (4) Canned goods from Baltimore, Md., to Shelby, N. C.; (5) Beer and ale from Newark, N. J., to Gastonia and Wadesboro, N. C.; (6) Roofing and screen wire from York, Pa., to all points in North Carolina.

All authority granted is either to *or* from fixed termini (except that a part of the authority granted to transport yarn is described territorially for both origins and destinations) and in most cases is both to *and* from fixed termini. There is no evidence that appellee, in fact, operated to and from fixed termini.

In some cases the same fixed termini are authorized for more than one commodity; in other cases, the fixed termini differ as the commodities differ. This results in situations like these: Marcus Hook, Pa. is within the authorized destination territory for cotton yarn, but is not an authorized destination for asbestos textile products, although both commodities may start from the same origin in North Carolina and be transported in common carrier service in the same truck. Marcus Hook is an au-

thorized origin for southbound hauls of both petroleum products and linoleum and both may be loaded in the same truck. That truck is authorized to deliver both commodities at Greenville, S. C. However, if the same truck goes to Columbia, S. C. it must confine its deliveries to petroleum products while if it goes to Spartanburg, S. C. it must confine its deliveries to linoleum. At the same time, both commodities may be delivered without restriction to any destination in North Carolina.

As another result under the authority granted; a truck loaded with petroleum products from Sewaren, N. J., or loaded with roofing from York, Pa., may pass en route through Baltimore, Md., and deliver the load or any part thereof at *any* point in North Carolina. The same truck is authorized to pick up canned goods as additional lading at Baltimore. The canned goods, however, may be delivered only to one destination, Shelby, N. C., regardless of the fact that the same truck will be rendering a common carrier service as to other commodities to all destinations in North Carolina.

2. *The nature of the evidence.* Examples of appellee's actual operations and undertakings, as described in undisputed evidence before the Commission, are noted to illustrate the effect of the construction of the statute adopted by the Commission.

There is no evidence in the record that the appellee took any affirmative act to limit its service on and since the "grandfather" date to the transportation authorized in the report, unless the happenstance of appellee's inability to secure a haul of every commodity from and to every point in the territory constitutes evidence of such a limitation.

There is undisputed evidence that from 1931 to the date

of the hearing appellee conducted broad transportation services through a wide territory, rather than from and to fixed termini. This is found in part in the oral testimony of witnesses of the carrier and of shippers using the carriers' service who dealt with the solicitation of freight of all kinds throughout most of the territory embraced in the application. (R. 44, T. 86; R. 60, T. 114; R. 77-81, T. 145-152; R. 82-83, T. 155; R. 84, T. 158; R. 94, T. 176; R. 98, T. 183; 127-139, T. 236-258)

In addition, the whole record before the Commission is replete with illustrative descriptions of individual movements not noted in the Commission's findings.[5] These are found in the testimony of appellee's officers and drivers (R. 45-75, T. 88-141; R. 98-154, T. 184-286), and in the testimony of shippers who utilized appellee's service. (R. 43-45, T. 83-87; R. 75-98, T. 141-183) Much of this evidence is not reflected in any finding in the report, presumably because of the construction given by the Commission to Section 206(a).

To develop a representative example, we may analyze the southbound service from Baltimore, Md. The Commission limits that service for the future to the transportation of a single commodity, canned goods, to a single destination, Shelby, N. C., this on the ground that such was the limit of the actual service rendered to a substantial degree from Baltimore on and since the statutory date However, Exhibit 1 (R. 155-163, received in evidence R. 155) shows the following additional movements from Baltimore: Canned goods to Charlotte, N. C., in June, 1934, and on two different days in January, 1935; canned

[5] The Examiner of the Commission who presided at the hearing ruled at the very outset that no weight would be given to testimony describing services rendered according to states, and the witnesses were directed to confine themselves to individual points and individual commodities. (R. 56, T. 107)

goods to Gastonia, N. C., in May, 1934; medicine to Dallas, N. C., in June, 1934; wire and enamelware to Monroe, N. C., in May and June, 1934; plumbing supplies to Monroe, N. C., in October, 1934; canned goods to Charlotte and Lincolnton, N. C., in January, 1936; and canned goods to Gastonia, N. C., in February, 1936. Oral descriptions of additional transportation service southbound from Baltimore or destinations other than Shelby are found in the testimony of four different truck drivers employed by appellee or its predecessor. (R. 59, T. 112; R. 102, T. 191; R. 116, T. 216; R. 132, T. 245)

As another example: The certificate authorized would permit appellee to serve all of the state of Pennsylvania on and east of U. S. Highway 11 as a destination territory for cotton yarn on northbound hauls. For southbound commodities, from the same territory in Pennsylvania, the appellee would be limited to petroleum products and linoleum from Marcus Hook and to roofing and screen wire from York. Exhibit 1, just mentioned, shows that in the course of its operations appellee from time to time secured southbound loads from other origins in Pennsylvania as follows: Warp rolls and yarn on repeated occasions from Chester; cotton skeins from Allentown; oil from Oil City; rayon from Lewiston; machines, yarn, warps, merchandise, batteries, steel bars, and cones from Philadelphis; yarn from Pottstown; warps from Clifton Heights and batteries from Temple.

All of the foregoing origins lie within the territory to which the appellee is authorized to carry northbound shipments of cotton yarn. Having made a delivery in that territory, appellee, under the order, will not be permitted to pick up a return load therein at any point other than Marcus Hook or York despite the fact that its normal course of business has been otherwise.

The testimony of appellee's drivers and shippers above referenced shows that the type and character of business carried on by appellee on and since June 1, 1935, has followed the pattern of irregularity as to commodities and points within the territory. If we look at the whole, rather than the pieces, the traffic was substantial. A representative of a broker who solicited traffic for appellee stated that the traffic he personally handled amounted to "twenty loads a month up and back, that is from the two Carolinas up to eastern points and back to the Carolinas from the eastern points." (R. 141, T. 262) Shippers started using the service to a few points and from time to time increased the points within the same territory. (R. 83, T. 155; R. 84, T. 158). The presiding Examiner directed that the evidence offered be limited to a naming of specific points (R. 56, T. 183), but, as one shipper put it, "every week there were different shipping points". (R. 84, T. 158)

3. *Proceedings in the court below.* The briefs for appellants on occasion treat the opinion and findings of the court below as if no question of statutory construction were involved, and as if that court simply substituted its judgment for that of the Commission as to the conclusion to be drawn from the undisputed evidence. The opinion of that court and its findings of fact and of law show, however, that the lower court did not concern itself with what should be the precise limits of the certificate to be granted to appellee. Rather, the court confined itself to the matter of statutory construction and found that the intent of Section 206(a) was to permit a common carrier in business on the statutory date, and continuously since, to continue in the same type and kind of business (R. 29); that the statute cannot be construed as justifying the limiting of a certificate to the precise commodities theretofore

hauled and precise points theretofore served (R. 24, 29); that while a mere holding out is not enough, yet bona fide operations are proven by a showing of a substantial business transported within the territory as a common carrier (R. 30); that the definition of a common carrier contained in section 203(14) of the Motor Carrier Act, 1935, did not authorize the limitation imposed by the Commission (R. 30); that since, as a matter of law, appellee was a common carrier of general freight during the "grandfather" period, it became entitled to a certificate on the same basis (R. 31); that in the absence of statutory authority for the limitation imposed upon the Commission, its action in imposing such a limitation is so arbitrary and unreasonable as to transcend the Commission's power (R. 24, 33); that the limitation imposed by the Commission cannot be justified on the ground that it is based on a finding of fact by the Commission that the carrier in fact limited itself to the precise commodities transported and the precise points served, since such a finding is not supported by any evidence (R. 33); and that the Act did not authorize the Commission to make the distinction between common carriers by regular routes and those by irregular routes announced by the Commission in its report. (R. 33). In conclusion, the lower court specifically noted that it was not to be understood as saying that complainant is entitled to the certificate applied for. It confined its opinion and findings to principles of law to be observed by the Commission in further proceedings upon the case being remanded to it. (R. 34)

SUMMARY OF ARGUMENT.

I. While administrative agencies are entitled to wide latitude in determining matters committed to their care, they must proceed upon a proper construction of the authorizing statute. If it appears that the Commission misconstrued the statute, or failed to make necessary preliminary findings, or made findings wholly unsupported by evidence, applied different principles of law to those entitled to equality under the law, or based its conclusions on considerations so unrelated to the matter before it as in effect to deny a sensible exercise of judgment, the Commission committed an error of law which may be corrected by judicial review.

II. Appellee, in seeking a certificate, relied in part on proof that it held itself out to transport general commodities within a territory (not between fixed termini), and rendered services consistent with such a holding out. The ultimate conclusion of the Commission denying, except to a meagre extent, the operating authority applied for, is neither supported by a finding that there was, in fact, no such holding out, nor by a finding that the operations conducted in the transportation of general commodities within the territory where the Commission did recognize appellee as being a common carrier of specified commodities, were and are inconsistent with the holding out.

III. There is no evidence that appellee in fact restricted its undertaking to the precise towns and cities served with regularity on and since the "grandfather" date, and as to each set of such towns and cities, to the precise commodities actually transported in substantial volume therefrom and thereto.

IV. The Commission used two tests for determining the bona fide operations of appellee within the territory which are not warranted by the statute and are based on a misconstruction thereof. First, it used the test of regularity of operations, although the dominant characteristic of appellee's operations is irregularity. Consequently the Commission declined to consider the general type, character, nature and characteristics of the service, although the intent of Congress is that these very matters should govern. Secondly, the Commission used the test of points actually served and commodities actually carried, rejecting all other evidence as to the undertaking of the carrier although Congress intended that the technical terms of the statute be given their ordinary common law meaning. At the common law, the holding out or undertaking is the controlling test of a common carrier and of the extent of the common carrier services rendered by or claimed from him. According to correct legal principles one is a common carrier as to particular service if that service is within the carrier's undertaking regardless of whether or not the same service has been rendered with regularity. One may be a common carrier even though the precise services previously rendered within the undertaking have been irregular, few and infrequent. It requires affirmative action on the part of a carrier to limit his undertaking to particular commodities within the territory where he generally operates, and such a limitation is not to be inferred from the negative circumstance of inability to secure the transportation of a particular commodity in substantial volume.

This misconstruction by the Commission of the statute is in part due to a confusion on its part as between the criteria for determining the scope of the business of a contract or private carrier, on the one hand, and the

extent of the undertaking of a common carrier on the other.

In addition to applying erroneous criteria for determining the bona fide operations of the appellee within the territory, the Commission applied different criteria in the case of the appellee as an irregular route than in the case of a regular route common carrier. There is no warrant in the statute for such a differentiation.

The statutory qualification of the term "common carrier" by the phrase "bona fide operations of" does not support the construction of the statute on which the Commission proceeded in this case. As a matter of law, "operations" are coextensive with "undertaking". The adjective "bona fide" does no more than require that the operations be conducted in good faith. It further implies that a mere theoretical holding out is not sufficient. It does not, however, mean actual physical performance as to precise points and specific commodities, which is the narrow concept given by the Commission to the phrase. The fact that the controlling time is fixed as a single day, "on June 1, 1935", rather than a period of months or years plainly indicates that the extent of the transportation business of one applying for a certificate is not to be measured by actual physical performance as distinguished from the undertaking, viewing the latter from the standpoint of the shipping public and measuring it by the general type and character of business in which the carrier was known to be engaged.

In another case heretofore argued this term (*Alton R. R.* v. *United States*, No. 110), the Government and the Commission have urged upon this Court a construction of the statute wholly inconsistent with that adopted by the Commission in this case:

V. *Loving* v. *United States*, 310 U. S. 609, is not decisive of this case. In the first place, it is distinguishable on the facts. In the second place, the Commission did not there announce and follow the misconstruction of the statute here complained of. In the third place, that case did not involve the absence of necessary preliminary findings nor did it involve the error of law which flows from differentiating between irregular route and regular route carriers as to the criteria to be used in determining bona fide operations.

ARGUMENT.

I. THE QUESTIONS PRESENTED ARE LEGAL QUESTIONS AND DO NOT REQUIRE THE COURT TO WEIGH THE EVIDENCE.

We well appreciate the necessity for according administrative agencies wide freedom in administering the many matters of great public importance entrusted to their care. At the same time, administrative regulation must be in accord with the legislative intent as found in the statute granting the authority. Those whose property and fortunes are at the mercy of the administrative body are entitled to the protection of the judiciary in any case where, through mistake, or otherwise, the administrative body restrains a normal business activity otherwise than as intended by Congress. Unless an order of an administrative body is within the intent of Congress as to the scope of the authorized regulation, the statute is not applied in a just and reasoned manner. When an order is predicated on a misconstruction of the governing statute, the issuance of an injunction is not an unwarranted interference with administrative practices, but rather is as essential to the proper administration of regulatory laws as is a fair hearing.

1. The function of the Commission in this case is limited by the statute. The function of the Commission in this case was limited under Section 206(a) of the Motor Carrier Act, 1935, to determining what were, on June 1, 1935, and since, the bona fide operations of the appellee and its predecessors as a common carrier within the territory covered by the application. No questions of public policy, convenience and necessity, highway conges-

tion, or of unsatisfactory competitive or other conditions in the industry were involved. In rendering its decision the Commission was required to construe the statute as to what constituted "bona fide operations as a common carrier within the territory", to receive and consider all evidence relevant under the statute as properly construed and to exclude from its consideration any evidence not relevant thereunder, to make preliminary findings of fact as to all matters necessary to a decision, and to announce a conclusion responsive to the preliminary findings of fact so made.

If it here appears that the Commission gave a meaning to the statute different from that intended by Congress, or failed to make necessary and adequate preliminary findings of fact based on evidence relevant under the statute as properly construed, or made findings without any support in the evidence, or based its conclusions on considerations so unrelated to the matter before it as in effect to deny a sensible exercise of judgment, the Commission committed an error of law which may be corrected by judicial review.

2. *Judicial review is required where the Commission misconstrues the statute.* There are many cases in this Court in which orders of the Commission have been set aside because the administrative body committed errors of law of the character just described. Without going into detail, we note that such orders have been set aside in cases which, for convenience, may be grouped under the following categories of situations where—

(a) The report of the Commission did not contain preliminary findings on matters necessary to be determined as a support for the final conclusion, as in *United States v. Chicago, M., St. P. & P. R. R. Co.*, 294 U. S. 499, 504, in

which an order prohibiting reduction in rates on coal, because of a supposed disturbance of the general rate adjustment was enjoined, due to the absence of findings specifying the respects in which the proposed rate was unlawful; and as in *Florida* v. *United States*, 282 U. S. 194, 215, in which an order directed to intrastate rates was set aside because of the lack of findings of the basic or quasi-jurisdictional facts conditioning its power;

(b) The order was without any support in the evidence, as in *Florida E. C. R. Co.* v. *United States*, 234 U. S. 167, 186-188, in which an order requiring a reduction in rates was set aside as to a railroad because of lack of evidence pertaining to that particular carrier;

(c) The order of the Commission was the result of giving an erroneous meaning to the words of the statute, as in *United States* v. *Pennsylvania R. Co.*, 242 U. S. 208, 229, and *Baltimore & Ohio R. Co.* v. *United States*, 277 U. S. 291, 299-300, in which the Commission proceeded upon an erroneous construction of the word "practice", as found in Section 15(1) of the Interstate Commerce Act (U. S. C. Title 49, Section 15(1)); and as in *Interstate Commerce Commission* v. *Oregon-Wash. R. & Nav. Co.*, 288 U. S. 14, in which the order of the Commission proceeded upon an erroneous construction of the phrase "to extend its line" found in Section 1(21) of the Act. (U. S. C. Title 49, Section 1(21));

(d) The order of the Commission was predicated on an exercise of discretion not committed to the Commission by the statute, as in *Interstate Commerce Com.* v. *Northern P. R. Co.*, 216 U. S. 538, in which an order establishing through routes and joint rates was set aside on the ground that the matter was not one for the Commission's discretion where it was shown, according to proper legal

principles, that a reasonable and satisfactory through route existed;

(e) The order of the Commission was predicated on matters which the Commission could not lawfully use as a criterion for its action as in *Southern P. Co.* v. *Interstate Commerce Commission,* 219 U. S. 433, in which an order of the Commission requiring a reduction in rates was set aside because predicated on economic instead of transportation facts and circumstances;

(f) The Commission excluded from consideration facts and circumstances which legally ought to have been considered under the statute as properly construed as in *Louisville & Nashville R. Co.* v. *Behlmer,* 175 U. S. 648, 669, in which the Court refused to enforce an order of the Commission entered under Section 4 of the statute because the Commission excluded from consideration facts relating to competition as between carriers; as in *Brimstone R. & C. Co.* v. *United States,* 276 U. S. 104, 117, where the order of the Commission fixing divisions of rates between connecting carriers was set aside because it had not given consideration to certain items required by the statute to be considered; and as in *St. Louis & O'Fallon R. Co.* v. *United States,* 279 U. S. 461, 487, where the order of the Commission entered under the recapture provisions of Section 15(a) was set aside on the ground that the Commission had failed to consider certain elements of value which the statute required to be considered;

(g) The Commission proceeded upon a broader construction of the statute than was warranted by its terms as in *Central Railroad Co. of New Jersey* v. *United States,* 257 U. S. 247, and *Texas & P. R. Co.* v. *United States,* 289 U. S. 627, in which orders of the Commission entered under Section 3 of the Act were set aside on the ground

that the circumstances relied upon as a predicate for a violation of that statute were in fact not embraced within the purview thereof; as in *United States* v. *New York Central R. Co.*, 263 U. S. 603, in which an order requiring railroads to issue interchangeable mileage coupon tickets was set aside on the ground that the Commission had given the statute a broader application than that to which it was entitled according to its terms; and as in *Ann Arbor R. Co.* v. *United States*, 281 U. S. 658, 665, 666, 668, in which an order of the Commission requiring a reduction in freight rates was set aside on the ground that the Commission had given the Hoch-Smith Resolution (U. S. C., Title 49, Section 55) a different meaning than that to which it was entitled; and

(h) The Commission misconstrued the statute by giving it a narrower application than if it had been properly construed, as in *United States* v. *Missouri P. R. Co.*, 278 U. S. 269, in which an order of the Commission establishing through rates which short hauled the Missouri Pacific Railroad was set aside because the Commission had misconstrued Section 15(4) (U. S. C., Title 49, Sec. 15(4)), of the Act as applicable only in favor of a carrier in possession of the property.

In *Gray* v. *Powell*, No. 18, this Term, decided December 15, 1941, this Court noted that the judgment of the administrative agency should be set aside if it considered the statute under which it operated as embracing circumstances so unrelated to the task entrusted by the Congress to the agency as in effect to deny a sensible exercise of judgment. In that case an order of the Bituminous Coal Division of the Department of the Interior was sustained, over the objection of the Seaboard Air Line Railway that it was, contrary to the finding of the administrative agency, a "producer-consumer" within the

meaning of a statutory exemption. However, in that case the terms of the statute were not technical terms or terms of art with an accepted legal meaning, well known to the Congress, at the time of the statutory enactment, while in this case the term to be construed is a technical term with a well defined legal meaning. Nor could it be said in that case, as it can be said here, that the administrative body specifically announced that evidence, relevant and controlling as a matter of law, would be given no weight. Nor could it be said in that case, as it can here, that the administrative body announced and followed a rule of using different criteria for determining statutory application, dependent on who was before it.

II. THE REPORT OF THE COMMISSION IS DEVOID OF PRELIMINARY FINDINGS OF FACT SUFFICIENT TO SUPPORT THE FINAL CONCLUSION.

In concluding its report, the Commission finds in the terms of the statute that appellee's predecessor in interest was on June 1, 1935, and continuously since it and its predecessor have been, in bona fide operation as a common carrier by motor vehicle in interstate commerce of twelve specified commodities, different points or territories of origin and destination being specified for each such commodity. (R. 10) As to transportation services beyond those authorized, the finding is "that the application in all other respects should be denied." (R. 10-11)

The negative finding last mentioned is not supported by preliminary findings of fact sufficient to disclose the basis of, and the reasoning upon which the Commission arrived at its conclusion.

There is a general finding in the report that appellee made no substantial showing of service to establish bona fide irregular route operations in the transportation of

general commodities from and to *all points* in the states included in the application. (R. 10) However, as is developed under Point IV, 3, of this argument, the Commission's views as to what constitutes substantial evidence were constrained by the erroneous construction which it gave to Section 206(a). Furthermore, the all-inclusive statement as to lack of evidence to *all points* hardly constitutes a predicate for withholding a certificate as to general commodities to and from the general territories, such as the state of North Carolina, on the south, and the state of Pennsylvania east of U. S. Highway No. 11, on the north, between which the Commission did recognize appellee as being in bona fide operation as a common carrier as to certain specific commodities.

The Commission makes no finding of fact to dispose of the appellee's contention regarding its broad holding out (R. 10), except to find as to a single commodity, cotton yarn, that the holding out extended to service from twelve counties in North Carolina, and that the appellee had conducted operations consistent with that holding out. (R. 9.)

The Commission may have been of the opinion that as to other features of the case appellee had failed to conduct an operation consistent with the holding out. The fact remains that it made no finding to that effect. In view of the contentions and proof of the appellee, such a finding is required to support the limitations imposed on the business of the appellee by the order here complained of, and without the support of such a finding the order is void and should be set aside.

III. THERE IS NO EVIDENCE TO SUPPORT A FINDING THAT THE SERVICE ACTUALLY RENDERED ON AND SINCE THE STATUTORY DATE FIXES OR FIXED THE PRECISE LIMITS OF THE UNDERTAKING OF THE APPELLEE AS A COMMON CARRIER WITHIN THE TERRITORY ON JUNE 1, 1935, AND SINCE.

The finding of the Commission that the limits of the undertaking of the appellee as a common carrier are fixed by the service actually rendered was presumably intended to be a finding of law rather than of fact. However, if the contrary is argued, then we submit that there is no evidence of any sort to support such a finding. All the evidence points to the fact that neither in the "grandfather" period, nor since, has the appellee by any affirmative act of its own restricted its undertaking to the services shown to have been actually rendered.

IV. THE CRITERIA USED BY THE COMMISSION TO DETERMINE THE BONA FIDE OPERATIONS OF THE APPELLEE AS A COMMON CARRIER OVER IRREGULAR ROUTES IN THE TERRITORY WHICH IT HELD ITSELF OUT TO SERVE, ARE NOT WARRANTED BY THE MOTOR CARRIER ACT, 1935.

1. *The criteria used by the Commission.* The report of the Commission shows on its face that two different tests were used to determine the scope of the bona fide operations of the appellee on and since the "grandfather" date, and also shows that the Commission considered it had the right, as a matter of policy, to use a different test in the case of an irregular route, than in the case of a regular route operator.

The first test used was transportation with "a fair degree of regularity". That phrase was applied affirmatively to certain points and certain commodities. (R. 9) By inference, points not mentioned were served, and commodities not mentioned were hauled, without regularity. Irregularity, however, is the dominant character-

istic of the business in which appellee was and is engaged, and stamps it as a carrier of general commodities over irregular routes within a territory, rather than as a special hauler or as a carrier over regular routes between fixed termini.[6] In using irregularity of service as a reason for withholding operating authority, the Commission used a criterion which is not warranted by the statute and which, in truth, is in the teeth thereof. Congress unquestionably intended to grant legislative approval to a continuance of the same type and character of business as was honestly and openly conducted by any common carrier by motor vehicle on June 1, 1935.

In the foregoing we do not mean to characterize the business of appellee, when viewed in its entirety, as irregular. The whole operations were consistent and regular throughout the territory. The individual movements, however, were irregular as to routes used, towns served, and commodities carried. The Commission applied a legal principle which prevented it from seeing the forest because

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[6] In *Fleming Common Carrier Application*, 8 M. C. C. 469, the Commission granted a certificate to a carrier operating over irregular routes from Detroit to all points in a large number of states, although actual service was shown to but a few points in each state. In the course of its opinion, at page 473, the Commission said:

> "Clearly, we must take into consideration the nature or characteristics of a transportation service when issuing a certificate under section 206(a) of the act, the provisions of which require in substance that the authority granted shall permit a carrier to conduct the bona fide operations it was conducting on June 1, 1935," citing *Reliance Trucking Co., Inc., Contract Carrier Application*, 4 M. C. C. 594.

The validity of the order entered by the Commission in the *Fleming* case is before this Court in *Alton R. R.* v. *United States*, No. 110, this Term. In the brief filed jointly on behalf of the Government and the Commission in that case, it is argued that the Commission acted upon correct legal principles in granting Fleming the certificate sought.

of the trees. Viewed in proper perspective, the operations were neither intermittent nor sporadic.

Not content with resting its limiting conclusion, which virtually amounts to a death sentence, on the very characteristic which gave appellee life in the "grandfather" period, the Commission would further limit appellee's struggle for survival to the precise service rendered in substantial volume on and since June 1, 1935. This is the second test, and when applied the Commission treats the undertaking of the carrier, as distinguished from its actual performance, as without the slightest materiality. This treatment, the Commission says, is in accord with its construction of Section 206(a) and 209(a). According to the Commission's construction, these sections defined the undertaking of a common or contract carrier as though affirmatively limited to the precise services, both as to commodities and points, actually performed on and since the "grandfather" dates. We show below that such a construction is contrary to all accepted legal concepts as to the extent and scope of the operations in which a **common** carrier is engaged.

2. *The Commission erroneously considers the same criteria appropriate for a* COMMON *carrier as for a* CONTRACT *carrier.* The Commission may be and probably is right in its construction of Section 209(a) which relates to permits to be accorded contract carriers. A contract carrier is a private carrier. He does not undertake to do more than agreed to in individual agreements and he has no undertaking until after such a special contract is entered into. He has no relation to the general public. So in Section 209(b) of the Act, the Commission is authorized in the case of a contract carrier permit, "grandfather" or otherwise, to specify "the business of the contract carrier covered thereby and the scope thereof."

Such specification in a "grandfather" permit may be limited lawfully to actual operations as of the "grandfather" date since there is no theory of law on which the contract carrier could claim he was engaged in any broader operations than actually conducted. In the case of a common carrier, Section 208(a) of the Motor Carrier Act, 1935, is different and authorizes the Commission to "specify the service to be rendered * * * and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate;". In a well considered report, *Dixie Ohio Exp. Co., Common Carrier Application,* 17 M. C. C. 735, 744-745, the Commission held that the section last quoted did not require it to specify in a common carrier certificate the exact commodities to be transported unless there is *evidence* that the undertaking of the carrier was so restricted.

In proceeding in this case on the legal theory, which is plainly erroneous, that a common carrier and a contract carrier are alike as to the circumstances which define the scope of their respective businesses, operations, or undertakings, the Commission has committed the same error of law as is reflected in its reasoning in other cases. See *Bornstein* CONTRACT *Carrier Application* 2 M. C. C. 95, 96-97; and also *Kelly* COMMON *Carrier Application,* 3 M. C. C. 79, 81, the latter citing as authority *Carroll* CONTRACT *Carrier Application,* 1 M. C. C. 788.

3. *The Commission erroneously applies different criteria to an* irregular *route than to a* regular *route common carrier.* The construction given Section 206(a) in this case, which impels the Commission to reject all evidence as to the scope of the common carrier undertaking of appellee, other than as to actual physical perform-

ance, is admittedly not followed in the case of a common carrier over regular routes between fixed termini. The reason for this distinction is stated thus in the report (R. 10):

> "To do otherwise would create the very ills which regulation is designed to alleviate, namely, congestion of highways, destructive rate practices and unbridled competition. Common carriers which are expected to maintain regular service for the movement of freight in whatever quantity offered to and from all points on a specified route, cannot operate economically and efficiently if other carriers are permitted to invade such routes for the sole purpose of handling the cream of the traffic available thereon in so-called irregular route service."

Appellant may say that the finding just quoted has reference only to the granting of a certificate without substantial evidence, which is the subject of the preceding sentence, and appellants may say that the requirement of substantial evidence is applied alike to irregular route and to regular route operators. Admittedly, the direct reference is to the need for substantial evidence. However, the context makes it plain that the Commission construed the statute when applied to appellee, an irregular route carrier, as authorizing it to treat as without substance all evidence other than as to *actual* operations conducted with continuous *regularity* both as to points served and commodities carried. To stress the words "substantial evidence" while ignoring the context in which found, and to urge that the lower court simply substituted its judgment for that of the Commission as to a question of fact, simply begs the question and ignores the *legal premises* on which the Commission predicated its finding as to what constitutes the substantial evidence required to justify a certificate.

We earnestly bespeak a fair consideration by this Court

of the propriety of those legal principles, since the fortunes of thousands of motor carriers operating over irregular routes depend on the Commission proceeding according to law. In saying this we are in full agreement with appellants that hardship to appellee is not a ground for setting the order aside if the Commission did construe and apply the statute according to correct legal principles.

4. *The statute should have been construed according to the common law meaning of the technical terms used therein.* The words in the "grandfather clause" of Section 206(a) which require construction are: "bona fide operation as a common carrier by motor vehicle on June 1, 1935, * * * within the territory for which application is made." Section 203(a)(14), as in effect on the date of the Commission's order herein, defines a common carrier by motor vehicle as "any person who or which undertakes * * * to transport * * * property, or any class of property, for the general public."[7] (U. S. C., Supp. V, Title 49, Section 303(a)(14).)

This case does not turn on whether or not appellee had and has the status required by the "grandfather" clause to the full extent claimed in its application. It is sufficient to demonstrate an error of law in the report if it appears

[7] Compare the phraseology used in the three parts of the Interstate Commerce Act in defining a common carrier subject thereto. Section 1(1)(a) of Part I, relating to railroads, uses the phrase "engaged in the transportation." (U. S. C., Title 49, Section 1(1)(a).) Section 302(d) of Part III, relating to water carriers, uses the phrase "holds itself out to the general public to engage in the transportation. (Transportation Act of 1940, 54 Stat. 898, 929, approved September 18, 1940.) Subsequent to the time this case was decided (July 10, 1940), Section 203(a)(14) of Part II, relating to motor carriers, was amended by the Transportation Act of 1940, so as to use the same phraseology as is found in Section 302(d) of Part III.

that the appellee had the status of a common carrier on the "grandfather" date and since beyond the limits imposed by the Commission.

The phrase "common carrier" is a technical term. It has been repeatedly defined by the courts and the extent of the undertaking, as distinguished from actual physical performance, has been universally held to be the touchstone by which to determine status. It must be assumed that Congress used the term in its common law meaning, unless it plainly appears from the statute itself that Congress intended otherwise. *Henry* v. *United States,* 251 U. S. 393, 395; *Cumberland Telephone & Telegraph Co.* v. *Kelly,* 160 Fed. 316, 321; 25 R. C. L. pp. 1053-1054.

a. *The common law meaning of "common carrier."* Gibson, C. J., in *Gordon* v. *Hutchinson,* 1 Watts & Serg. 285, characterized the following from *Gisbourn* v. *Hurst,* 1 Salk. 249, as the best definition of a common carrier known to him: "Any man undertaking for hire to carry goods of all persons indifferently."

The definition of a common carrier most frequently cited is that of Parker, C. J., in the case of *Dwight* v. *Brewster,* 1 Pick. 50, 53 (1822): "A common carrier is one who undertakes, for hire or reward, to transport the goods of such as choose to employ him, from place to place."

All text writers insist that the primary test of a common carrier is his holding out, that is, the undertaking to carry generally and indifferently for the public. *Hutchinson on Carriers* (3rd Edition), Section 47, p. 41; *Dobie on Bailments and Carriers,* pp. 301, 303; *Van Zile on Bailments and Carriers* (2nd Edition), Section 406, pp. 400-401.

It is often said that the test of the extent holding out

is determined by whether or not the carrier would be liable in an action if he refused, without some just ground, to transport for his reasonable and customary price. *Fish* v. *Chapman*, 2 Ga. 349, 46 Am. Dec. 393; *Piedmont Mfg. Co.* v. *Columbia & G. R. R. Co.*, 19 S. C. Rep. 353, 364, 16 Am. & Eng. R. Cases, 194, 202. In considering this test, it is important to note that if a carrier is requested to transport within the limits of his undertaking, he cannot legally divest himself of his common carrier status and by special agreement become a private carrier. *N. Y. C. R. Co.* v. *Lockwood*, 17 Wall. (U. S.) 357, 376-377.

If a particular service is within the holding out or undertaking of the carrier, he is a common carrier as to that service, regardless of whether or not precisely the same service has been rendered on previous occasions and regardless of the fact that the particular service is not the carrier's principal service or business. In *Dwight* v. *Brewster, supra*, the question was as to whether a stagecoach operator was a common carrier in the transportation of a package of bank notes from Northampton to Springfield. The usual business of the stagecoach was to carry mail and passengers. It had a mail contract and Springfield was not on the contract route, although the court noted that the coach "usually went that way." The evidence showed that the coach operator, as a matter of usual practice, did carry packages for hire, although the opinion does not identify precise origins and destinations. Under the circumstances, the stagecoach was held to be a common carrier of packages of bank notes, Parker, C. J., saying (italics ours):

> "That the principal business was to carry the mail and passengers, is no reason why the proprietors should not be common carriers of merchandise, &c.

> A common carrier is one who undertakes, for hire or reward, to transport the goods of such as choose to employ him, from place to place. This may be carried on at the same time with other business. The instruction of the judge in this particular, that the *practice of taking parcels* for hire to, be conveyed in the stagecoach, constituted the defendants common carriers, we think, was right."

In the above case, the general practice as to parcels, plus the fact that the coach ordinarily went by the destination, was sufficient to make the defendant a common carrier, even though its general business was to carry mail and passengers and there was no showing that bank notes had ever been carried to Springfield prior to the shipment out of which the case arose.

In the present case appellee's trucks usually went via Baltimore with a great variety of commodities but, in defiance of correct legal principles, the Commission considered appellee to be a common carrier from Baltimore only as to canned goods.

In *Shelden* v. *Robinson*, 7 N. H. 157, 26 Am. Dec. 726 (1834), the driver of a stagecoach was held *not* to be a common carrier under facts almost identical with those in *Dwight* v. *Brewster*, except for the single differentiating fact that in the *Shelden case* there was no holding out.

It is an accepted legal principle that one may be a common carrier, even though the precise services previously rendered within the undertaking have been few and infrequent. In *Fuller* v. *Bradley*, 25 Pa. (1 Casey) 120 (1855), the Supreme Court of Pennsylvania sustained a charge to the jury in which the lower court said:

> "Though the number of instances employed in carrying may be evidence of the character of a common

> carrier, it is not the rule which constitutes it. The law has no fixed number of instances which shall stamp him with the character. If he holds himself forth to the public to carry for hire, he is a common carrier as much in his first trip as in his second, third, or fourth."

In *Verner* v. *Sweitzer,* 32 Pa. (8 Casey) 208, 212 (1858), the same court said:

> "The readiness to carry for all who will employ gives the character to the bailment rather than the extent of his business, or the number of trips performed."

In *Pennewill* v. *Cullen,* 5 Harr. (Del.) 238, 241, a vessel owner was sued as a common carrier by reason of damage to grain in the course of being transported by him from Dover to New York City. It appeared that the usual business of the vessel owner was to transport under contract coal from Philadelphia to New York, returning with lime to Little Neck. It further appeared that on one occasion the vessel had transported grain to New York, although from Little Neck and not from Dover. The vessel owner was held liable as a common carrier, the court saying (italics ours):

> "The jury will decide upon the proof, whether the defendant held himself out to the public as engaged in the business of a common carrier. It is not necessary that his trips should be regular between the same points or places. If engaged in the business of carrying grain for others *generally* to and from *any* point, he is liable as a common carrier."

The law does recognize that one may be a common carrier of certain commodities and not of other commodities. In all such cases, however, the limitation was made known to the public and was not merely inferred

from an infrequency of service. See *Tunnel & Short* v. *Pettijohn*, 2 Harr. (Del.) 48, in which the limitation was based on a general usage not to carry packages of unusual bulk and weight; *The Citizens' Bank* v. *The Nantucket Steamboat Company*, 2 Story (U. S.) 16, 32-35 (1841), in which the limitation was referred to as "known and avowed"; *Powell* v. *Mills*, 30 Miss. 231, 64 Am. Dec. 158 (1855), in which the general course of business of the carrier was relied upon as determining his status; and *Honeyman* v. *Oregon & California R. R. Co.*, 13 Oreg. 352, 57 Am. Rep. 20 (1886), in which the carrier had definitely refused to extend its undertaking to the particular commodity.

If the Commission had applied the legal principles above summarized to the undisputed facts, it would have found that the defendant was a common carrier on and since June 1, 1935, to a greater extent than is reflected in its report and order. There is no doubt but that it was appellee's general practice to take any commodity which could be secured from any origin to any destination throughout the territory in which its vehicles operated. There is no doubt but that appellee's vehicles were in constant operation between the entire state of North Carolina, on the south, and a broad northern territory which certainly included eastern Pennsylvania and northern New Jersey, on the north, since all of these territories are within the authority granted as to some of the commodities specified by the Commission. It cannot be reasoned that the appellee would have been sustained in a common law action if it had contended that its undertaking did not extend to the transportation of general commodities between such territories, or if it had contended that it was a private carrier as to some commodities, such as those handled infrequently, and a com-

mon carrier only as to commodities handled in substantial volume. Yet, if the Commission proceeded upon correct legal principles, appellee could have done just that.

b. *The qualifying words in Section 206(a) do not limit the term "common carrier" in the manner construed by the Commission.* When Congress qualified the term "common carrier" in Section 206(a) by the phrase "bona fide operations of", it did not intend to authorize the Commission to disregard the general undertaking of the carrier.

The "operations" of a carrier are co-extensive with its "undertaking." "To operate" a transportation service, is synonymous with "to engage" in the service, and both of these mean the same as "to undertake to transport".

The term "bona fide" has the primary meaning of "in good faith", and is directed to the matter of intent rather than physical performance, and it was so considered by this Court in *McDonald* v. *Thompson*, 305 U. S. 263, 266. In that case it was said that the phrase "bona fide" not only suggests absence of evasion, but also includes "actual rather than potential or simulated service." Read in its context, the reference to "actual" indicates the line to be drawn between a theoretical holding out, unaccompanied by a service which, if rendered, would have been in defiance of state laws, and a service honestly and openly rendered in compliance with state statutes.

If Congress had intended "bona fide" to have the concept of "actual" given to it by the Commission in this case, it would have used the English word rather than the Latin phrase.

The fact that the controlling time is a single day, "on June 1, 1935," rather than a period of months or years,

is of direct significance. The purpose of the "grandfather" clause is to authorize the continuance of any motor carrier business honestly and openly conducted on that date. If "bona fide operations" be read as "actual service performed on June 1, 1935," the purpose of Congress could not be achieved. To carry out its purpose, "bona fide" must be read as meaning not only the service actually performed on that one day, but, in addition, all services which the public reasonably considered as being included within the carrier's undertaking on that day. This in turn means that full effect must be given to the carrier's holding out as evidenced by its solicitation and by the type and character of operations conducted in the usual and normal course of business during a considerable period both before and after January 1, 1935.

In other cases, the Commission has given effect to the reasoning just advanced, saying in *George Cassens & Sons Common Carrier Application*, 1 M. C. C. 771, 774:

> "It obviously was not the intent of the Congress that a carrier must have been in physical operation to all points to which such carrier claims to have rendered service, on the exact date specified in the statute. It is apparent that if such were the intent and purpose of the 'grandfather' clause provision, the effect would be to destroy the business of many small irregular operators, who may not actually have been in physical operation to all points in the territory claimed on the statutory date, but who did serve a great number of points therein within a reasonable time before and subsequent to that date. A more appropriate view of the application of the 'grandfather' clause date in such cases is that a carrier is entitled thereunder to claim the territory or the points which it might reasonably have served by reason of its operations prior to, as well as on, the statutory date, and subsequent thereto. In other words, the question in such cases is: What was the extent of the transportation business honestly and openly carried on by the carrier as of that date?"

See also *Fleming Common Carrier Application*, 8 M. C. C. 469, in which an order of the Commission granting broad territorial rights was predicated on the undertaking or holding out of the carrier on the statutory date.[8]

If the Commission had applied in this case the legal principles which it followed in the *George Cassens* case and in the *Fleming case*, it would have correctly construed

[8] The validity of the order of the Commission in the Fleming case is before this Court in *Alton R. R.* v. *United States*, No. 110, this Term. The appellant in that case contends that Section 206(a) was intended to limit carriers operating over irregular routes "to their actual operations, the precise territory they were serving during the 'grandfather' period." (Br. 47) The Government and the Commission have submitted an argument to this Court in No. 110 which is opposed to the contention of appellants in that case and which is wholly inconsistent with the construction given the statute by the Commission in this case, the following being quoted from the joint brief filed by the Government and the Commission in No. 110:

> "The fact that, as to the points noted and other points, the shipments carried by him were few and separated, or varying in frequency, could not be taken as establishing that Fleming was no longer bona fide engaged in transportation to those points, if that was not the reasonable conclusion to be drawn therefrom, in view of the marketing characteristics of the industry and the fact that his service was not one for which there was steady demand. The fact, too, that Fleming's operations, as evidenced by shipments transported prior to the 'grandfather' date, were shown to have been conducted to certain points in a State only, could not be taken to establish that the operations he was bona fide engaged in were confined to those points, if such a conclusion would be in conflict with the real character of his operations made necessary by the marketing characteristics of the industry whose products he moved." (Br. 43)
>
> "• • • We do not think that the 'grandfather' clause can properly be interpreted as freezing a carrier's operations fast to be precise trips in fact made by him prior to the administrative hearing before the Commission; such a result is in conflict with even the literal language of the clause; that refers to operation on and since June 1, 1935, and there is every probability that no carrier will have made after the 'grandfather' date the identical trips made approximately at that date." (Br. 49)

Section 206(a) and would have accorded appellee operating rights, both as to commodities and territories, substantially broader than as reflected in the order enjoined by the lower court. In saying this, we are not to be understood as contending that mere inconsistency between reports of the Commission warrants judicial interference with its orders. However, when the question involved is purely one of statutory construction, it must necessarily follow that there is but one correct construction, and we point to the reasoning in the *George Cassens* and in the *Fleming cases* as supporting our own views as to what is the correct construction of the statute.

V. THE LOVING CASE IS NOT DECISIVE OF THE QUESTIONS INVOLVED IN THIS CASE.

In the briefs of the Government (pp. 13-15) and of the Commission (pp. 16-19), it is argued that the *per curiam* opinion of this Court in *Loving* v. *United States,* 310 U. S. 609, affirming the judgment of the lower court which dismissed a complaint against an order of the Commission, arising under the "grandfather" clause of Section 206(a), is decisive of and controlling in this case. We respectfully submit that it is not.

In *Loving Common Carrier Application,* 12 M. C. C. 571, the applicant sought a certificate authorizing the transportation of general commodities via irregular routes in the states of Oklahoma, Kansas, Colorado, Texas and New Mexico. That report shows that Loving offered proof as to only 30 shipments for the whole of the territory as compared with the hundreds of shipments covered by the evidence in this case. Of the 30 shipments shown in the *Loving case,* 23 originated at or were destined to Oklahoma City, Oklahoma, or Denver, Colorado. The only service shown to or from

Kansas consisted of one trip from Lawrence, Kansas, to Tulsa, Oklahoma, one trip from Denver, Colorado, to Liberal, Kansas, and one trip from Wichita, Kansas, to Denver, Colorado. No service at all was shown as having been rendered to or from New Mexico. Some few trips were shown to or from Texas prior to June 1, 1935, but none of these occurred after June 1, 1935, except one trip in August and another trip in September, 1937. The Commission, in effect, treated the Texas service as having been abandoned.

The Commission held that the extremely limited service to Kansas and the lack of any service to New Mexico, did not justify a finding as to bona fide operations. However, the applicant was given a certificate between *all* points in Oklahoma on the one hand, and all points in Colorado on and east of Highway 87 on the other, although the number of points in either the territory of origin or destination which had received an actual service were few in number, especially as compared with the points of origin and destination shown in this case.

It fairly appears on the face of the report, that Loving was given all the territory to which he was entitled under the construction of Section 206(a) for which we are contending in this case.

The Commission did limit Loving to seven commodities although it authorized him to transport any one of the commodities to or from any destination to which he was authorized to transport any other commodity. The only commodities excluded from the order which Loving had ever handled between Oklahoma and Colorado, were cottonseed cake and beans, as to which the record showed evidence of only a single shipment as to each commodity prior to the statutory date. The Com-

mission included within the commodities authorized all those which the report showed had been generally solicited.

There is nothing on the face of the report in the *Loving case* to show the misconstruction of the statute of which we here complain. The court proceeding in that case involved primarily questions of fact. The only possible question of law was as to whether a *theoretical* holding out unaccompanied by a showing of any real operations constituted proof of a common carrier status under the "grandfather" clause of Section 206(a). This Court apparently took that same view of the case as is evidenced by the authorities cited in its *per curiam* opinion.

The *Loving case* does not control any one of the questions involved in this case. We have on the face of the report in this case an announced construction of the Act which is not in accord with correct legal principles. Furthermore, we have an absence of necessary preliminary findings, and a lack of evidence to support the finding which the Commission did make as to a carrier's undertaking being limited to the points actually served and the commodities actually carried. In addition, the Commission proceeded in this case upon a distinction between irregular route and regular route carriers which is not warranted by the statute. Finally, in this case, the Commission limited much of the authority to a point to point service, that is, between fixed termini, although under the statute it was obligated to provide for territorial operations.

Conclusion.

The Commission misconstrued the Motor Carrier Act and, in limiting appellee to the operating rights provided for in the order complained of, exceeded its statutory authority. It is therefore respectfully submitted that the decree of the District Court should be affirmed.

HARRY F. GILLIS,
Washington, D. C.

LUTHER M. WALTER,
JOHN S. BURCHMORE,
NUEL D. BELNAP,
Chicago, Illinois,
As Amici Curiae.

January 5, 1942.

APPENDIX.

Statutes involved.

The pertinent provisions of the Motor Carrier Act, 1935, applicable at the date of the Commission's order, July 10, 1940 (c. 498, 49 Stat. 543; c. 811, 52 Stat. 1236) are as follows:

SEC. 203. [U. S. Code, Sup. V, title 49, sec. 303.] (a) As used in this part—

* * * * *

(14) The term "common carrier by motor vehicle" means any person who or which undertakes, whether directly or by a lease or any other arrangement, to transport passengers or property, or any class or classes of property, for the general public in interstate or foreign commerce by motor vehicle for compensation, whether over regular or irregular routes, including such motor vehicle operations of carriers by rail or water, and of express or forwarding companies, except to the extent that these operations are subject to the provisions of part I.[1]

SEC. 206. [U. S. Code, Sup. V, title 49, sec. 306.] (a) Except as otherwise provided in this section and in

[1] By the Transportation Act of 1940, approved September 18, 1940 (54 Stat. L. 898, 920), Section 203(a)(14) was amended to read as follows:

"The term 'common carrier by motor vehicle' means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to part I, to which extent such transportation shall continue to be considered to be and shall be regulated as transportation subject to part I."

section 210a, no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, however,* That, subject to section 210, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in conection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207(a) of this part and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful:

* * *

SEC. 208. [U. S. Code, Sup. V, title 49, sec. 308.] (a) Any certificate issued under section 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified

routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under section 204(a)(1) and (6): *Provided, however,* That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require.

SEC. 209. [U. S. Code, Sup. V, title 49, sec. 309.] (a) Except as otherwise provided in this section and in section 210a, no person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway or within any reservation under the exclusive jurisdiction of the United States unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such person to engage in such business: *Provided,* That, subject to section 210, if any such carrier or a predecessor in interest was in bona fide operation as a contract carrier by motor vehicle on July 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or, if engaged in furnishing seasonal service, only, was in bona fide operation on July 1, 1935, during the season ordinarily covered by its operation, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such permit, without further proceedings, if application for such permit is made to the Commission as provided in paragraph (b) of this section

and within one hundred and twenty days after this section shall take effect and if such carrier was registered on July 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such permit. Otherwise the application for such permit shall be decided in accordance with the procedure provided for in paragraph (b) of this section and such permit shall be issued or denied accordingly. Pending determination of any such application the continuance of such operation shall be lawful. Any person, not included within the foregoing provisions of this paragraph, who or which is engaged in transportation as a contract carrier by motor vehicle when this section takes effect, may continue such operation for a period of one hundred and twenty days thereafter without a permit and, if application for such permit is made within such period, the carrier may, under such regulations as the Commission shall prescribe, continue such operation until otherwise ordered by the Commission: *Provided further,* That nothing in this part shall be construed to repeal, amend, or otherwise modify any Act or Acts relating to national parks and national monuments under the administrative jurisdiction of the Secretary of the Interior, or to withdraw such authority or control as may by law be held by the Secretary of the Interior with respect to the admission and operation of motor vehicles in any national park or national monument of the United States.

(b) Applications for such permits shall be made to the Commission in writing, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission may, by regulations, require. Subject to section 210, a permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and able properly to perform

the service of a contract carrier by motor vehicle, and to conform to the provisions of this part and the lawful requirements, rules, and regulations of the Commission thereunder, and that the proposed operation, to the extent authorized by the permit will be consistent with the public interest and the national transportation policy declared in the Act; otherwise such application shall be denied. The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof and shall attach to it, at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations consistent with the character of the holder as a contract carrier as are necessary to carry out, with respect to the operations of such carrier, the requirements established by the Commission under section 204(a)(2) and (6): *Provided, however,* That no terms, conditions, or limitations shall restrict the right of the carrier to substitute or add contracts within the scope of the permit, or to add to his or its equipment and facilities, within the scope of the permit, as the development of the business and the demands of the public may require.

SUPREME COURT OF THE UNITED STATES.

No. 197.—October Term, 1941.

The United States of America and Interstate Commerce Commission, Appellants, vs. Carolina Freight Carriers Corporation.	Appeal from the District Court of the United States for the Western District of North Carolina.

[March 2, 1942.]

Mr. Justice Douglas delivered the opinion of the Court.

This is an appeal under § 210 (28 U. S. C. § 47a) and § 238 of the Judicial Code as amended (28 U. S. C. § 345) to review a final decree of a district court of three judges (28 U. S. C. § 47) which set aside (38 F. Supp. 549) an order of the Interstate Commerce Commission (24 M. C. C. 305) granting appellee a certificate of public convenience and necessity as a common carrier by motor vehicle under the so-called "grandfather clause" (§ 206(a)) of the Motor Carrier Act of 1935 (49 Stat. 543, 551, 49 U. S. C. § 306), now designated as Part II of the Interstate Commerce Act. 54 Stat. 919.

Appellee's predecessor applied for such a certificate authorizing operation as a "common carrier" by motor vehicle of "general commodities"[1] between all points "in South Carolina, North Carolina, Delaware, New Jersey, Connecticut, Rhode Island, Massachusetts, those in Virginia east of and including the Shenandoah Valley, those in Maryland and Pennsylvania on and east of U. S. Highway 11, and those in New York east of Binghamton and south of Albany; and between Cherryville (N. C.) and Boston, Mass., through Henderson, N. C., Richmond, Va., Baltimore, Md., Philadelphia, Pa., and New York, over irregular routes." The Commission authorized the issuance of a certificate but restricted its scope in three ways. (1) It cut down the geographical area which could be served by appellee and in parts of that area

[1] With the exception of "commodities of unusual value, those in bulk, those requiring special equipment such as tank or refrigerator trucks, those injurious to other lading, live stock, automobiles and high explosives."

limited the service to designated points. (2) It allowed appellee to haul only certain specified commodities out of a larger list previously hauled. (3) It did not permit appellee to haul all of those specified commodities between all of the points in the authorized territory but allowed it to haul only certain commodities between given points. Its finding containing those restrictions (24 M. C. C., p. 309-310) reads as follows:

"We find that applicant's predecessor in interest was on June 1, 1935, and continuously since it and its predecessor have been, in bona fide operation as a common carrier by motor vehicle, in interstate or foreign commerce (1) of cotton yarn from all points in Gaston, Lincoln, Cleveland, Rutherford, McDowell, Burke, Catawba, Alexander, Iredell, Rowan, Davidson, and Davie Counties, N. C., to Hagerstown, Md., New York, N. Y., Pawtucket and Providence, R. I., all points in Pennsylvania on and east of U. S. Highway 11, and points in Middlesex, Union, Essex, Hudson, Passaic, Bergen, Somerset, and Morris Counties, N. J., (2) of asbestos textile products from Charlotte, N. C., to Philadelphia and North Wales, Pa., Trenton, Newark, Passaic, and Paterson, N. J., New York, N. Y., Middletown, Conn., Providence and Pawtucket, R. I., and Boston and Hudson, Mass., (3) of supplies and materials used in the manufacture of asbestos textile products from Harrison and Perth Amboy, N. J., to Charlotte, N. C., and empty spools and boxes in the reverse direction, (4) of petroleum products in containers from Sewaren, N. J., and Marcus Hook, Pa., to Columbia and Greenville, S. C., and to all points in North Carolina, (5) of linoleum from Paulsboro, N. J., Marcus Hook, Pa., and East Walpole, Mass., to points in North Carolina and to Spartanburg and Greenville, S. C., (6) of canned goods from Baltimore, Md., to Shelby, N. C., (7) of beer and ale from Newark, N. J., to Gastonia and Wadesboro, N. C., and (8) of roofing and screen wire from York, Pa., to all points in North Carolina, all over irregular routes; that applicant is entitled to a certificate authorizing continuation of such operation; and that the application in all other respects should be denied."

The District Court held that such restrictions were not authorized by the statute. It said:

"It is, of course, reasonable to limit the certificate to the type of service rendered by the carrier during the grandfather period, and to limit the territory to that within which substantial service of that type has been rendered; but it is unreasonable to limit the certificate of one who has functioned as a general carrier to the specific commodities carried and the specific points served. The law cannot reasonably be construed as authorizing such limitation."

It further noted that such restrictions have not been imposed on regular route carriers and that Congress has made no such distinction between them and irregular route carriers like appellee.

I. We think the Commission was justified in the restrictions which it placed on the geographical scope of appellee's operations. Sec. 206(a) of the Act authorizes the Commission to issue a certificate without a showing of public convenience and necessity if the carrier or its predecessor in interest was "in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time". Sec. 208(a) requires that the certificate specify "the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate." It is clear from these provisions that the power of the Commission to authorize future operations within a designated "territory", rather than over specified routes or between fixed termini, fits the peculiar requirements of irregular route operators such as appellee. Authority to operate within a specified "territory" may include permission to service all points in that area. On the other hand it may be restricted to designated points therein. Or as in the instant case, it may extend to all points in a part of that area and to selected localities in another part. The precise delineation of the area or the specification of localities which may be serviced has been entrusted by the Congress to the Commission. *Alton R. R. Co.* v. *United States*, 314 U. S. —. The Act provides the test of "bona fide operation". That standard carries the connotation of substantiality. It also makes clear that a holding out to serve a specified area is not alone sufficient. It is "actual rather than potential or simulated service" which is required. *McDonald* v. *Thompson*, 305 U. S. 263, 266. Substantial, as distinguished from incidental, sporadic, or infrequent, service is required. Substantial service actually rendered may have been confined to narrow limits. *Loving* v. *United States*, 32 F. Supp. 464, aff'd 310 U. S. 609. Ability to render the service throughout the wide reaches of the territory, which the applicant professed to be willing to serve, may not have existed. Furthermore, the characteristics of the transportation service rendered are relevant to the territorial

scope of the operations which the Commission may authorize. *Alton R. R. Co.* v. *United States, supra.* In addition, the Commission in determining the precise territory which may be served by a particular carrier cannot be unmindful of its responsibility to coordinate the various transportation agencies which constitute our national transportation system. S. Rep. No. 482, 74th Cong., 1st Sess.; H. Rep. No. 1645, 74th Cong., 1st Sess. This does not mean that the right to the statutory grant may be withheld or cut down because the Commission disapproves of the competitive conditions which may be created if the application is granted. But its responsibility to bring greater order and stability to the transportation system than had earlier obtained (S. Doc. No. 152, 73d Cong., 2d Sess.) is an additional reason for its insistence upon a showing of substantial service in that territory which is sought to be covered by a certificate under the "grandfather clause".

As we indicated in *Alton R. R. Co.* v. *United States, supra,* the purpose of the "grandfather clause" was to assure those to whom Congress had extended its benefits a "substantial parity between future operations and prior *bona fide* operations". We cannot say that that was denied in this case, if the limitations on the territorial scope of the operations are alone considered. While service to and from all points in the States included in the application was not allowed, the reduction was determined by the standard of substantiality of service. And consideration was given to the characteristics of irregular route carriers and their role in the national transportation system. That involved a weighing of specific evidence in light of the complexities of this transportation service. The judgment required is highly expert. Only where the error is patent may we say that the Commission transgressed. That is not this case.

II. We have doubts, however, as to the restrictions which the Commission has placed on the articles which appellee may carry. Sec. 203(a)(14) defined[2] the term "common carrier by motor vehicle" as one who "undertakes . . . . to transport passengers or property, or any class or classes of property, for the gen-

[2] In 1940 Congress amended § 203(a)(14) to read: "The term 'common carrier by motor vehicle' means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, ..." Act of Sept. 18, 1940, c. 722, §18(a), 54 Stat. 920. The earlier definition of "common carrier" was in force at the time of the hearing of this case before the Commission.

eral public in interstate or foreign commerce by motor vehicle for compensation, whether over regular or irregular routes". The Commission ruled that since a "common carrier" may transport only a "class or classes of property", the authority granted under the "grandfather clause" of § 206(a) "should reflect any limitation in the undertaking" of the common carrier "as indicated by the service actually rendered on and since the statutory dates." It accordingly proceeded to eliminate commodities which, though of the same general class as the others, had been carried before but not after June 1, 1935. It further restricted future operations to those commodities which prior and subsequent to June 1, 1935, had been carried in substantial amounts and with a degree of regularity. We would not disturb those conclusions if only a question as to the weight of the evidence was involved. But we are not satisfied that the Commission applied the proper criterion in reaching its conclusion that only specified commodities could be carried in the future.

Sec. 206(a) requires a showing that the applicant, or its predecessor, was "in bona fide operation as a common carrier" on June 1, 1935, and "since that time". By § 208(a) the certificate must specify "the service to be rendered" by the carrier. As we have noted, a "common carrier by motor vehicle" was defined in § 203(a)(14) as one who "undertakes" to transport "passengers or property, or any class or classes of property, for the general public". That definition is the same for irregular and regular route carriers. It is plain that a carrier's holding out and actual performance may be limited to a few articles only. That is to say he may be a common carrier only of a restricted number of commodities. See *Galveston Truck Line Corp.*, 22 M. C. C. 451, 467. Or the service actually rendered may have been confined to such a few commodities that his holding out or willingness to carry a much larger class may be disregarded. *Loving* v. *United States, supra*, was such a case. On the other hand, if the applicant has carried a wide variety of general commodities, he cannot necessarily be denied the right to carry others of the same class merely because he never carried them before. And where he has carried a wide variety of general commodities, he cannot necessarily be restricted to those which he carried with more frequency and in greater quantities than the others. See *H. B. Church Truck Service Co.*, 27 M. C. C. 191, 197; *Highway Motor Freight Lines,*

Inc., 23 M. C. C. 621, 636. The Commission may not atomize his prior service, product by product, so as to restrict the scope of his operations, where there is substantial evidence in addition to his holding out that he was in "*bona fide* operation" as a "common carrier" of a large group of commodities or of a whole class or classes of property. There might be substantial evidence of such an undertaking though the evidence as to any one article was not substantial. The broad sweep of his prior service may indeed have made the carriage of any one commodity irregular and infrequent. Yet viewed as a whole rather than as a group of separate and unrelated items, his prior activities may satisfy the test of "bona fide operation" as a "common carrier" within the scope of his holding out. The fact that some of the articles may have been carried before but not after June 1, 1935, may of course indicate an abandonment of the prior undertaking. See *United States* v. *Maher*, 307 U. S. 148. But it does not necessarily mean that they should be stricken from the certificate, since the natural and normal course of his business may reveal a continuous undertaking to transport any or all commodities embraced within the group or the class. That is to say, he may have been a common carrier of a large group of general commodities or of an entire class of property both before and after the critical date though the specific commodities carried varied considerably. The questions are whether his service within the territory in question was sufficiently regular and whether his coverage of commodities was sufficiently representative to support a finding that he was in "bona fide operation" as a "common carrier" of the group of commodities or of the class or classes of property during the periods in question.

The Commission in this case authorized the carriage of about a dozen kinds of commodities though in prior operations about three times that number had been carried. It is not our function to weigh the evidence. Hence we intimate no opinion as to whether more commodities should have been included had the proper criterion been employed. But we conclude that there is no statutory warrant for applying to irregular route carriers a different or stricter test as to commodities which may be carried than is applied to regular route carriers. The difference between those types of carriers may well justify a sharp delimitation of the far flung territory which an irregular route carrier may profess to serve. But once the territory has been defined, the statutory test of whether an applicant was a "common carrier" by motor vehicle in "bona

fide operation" during the critical periods is the same for the irregular and the regular route carrier. We are not confident that the Commission has approached the problem in that way. For it has repeatedly stated beginning with *Powell Brothers Truck Lines, Inc.*, 9 M. C. C. 785, 791-792, that:

"'Authority to transport general commodities throughout a wide territory over irregular and unspecified routes pursuant to the 'grandfather' clause of the act should be granted to a carrier only when such carrier's right thereto has been proved by substantial evidence. To do otherwise would create the very ills which regulation is designed to alleviate, namely, congestion of highways, destructive rate practices, and unbridled competition. Common carriers which are expected to maintain regular service for the movement of freight in whatever quantities offered to and from all points on specified routes cannot operate economically and efficiently if other carriers are permitted to invade such routes for the sole purpose of handling the cream of the traffic available thereon in so-called irregular-route service."

And see *Merchants Parcel Delivery Co., Inc.*, 21 M. C. C. 93; *Langer Transport Corp.*, 23 M. C. C. 302; *Lett & Co. of Indiana, Inc.*, 26 M. C. C. 159.

Insofar as that view establishes a different test for commodities which may be carried by irregular route operators than for commodities which may be carried by regular route operators it is erroneous as a matter of law. For facts sufficient to establish that a person is a "common carrier" by motor vehicle in "bona fide operation" in the one case are sufficient in the other. The statutory differences lie only in the territorial scope and pattern of the operation.

III. It follows from what has been said that a restriction on commodities which may be carried between specified points may not always be justified. If the applicant had established that it was a "common carrier" for a group of commodities or for an entire class or classes of property and was in "bona fide operation" during the critical periods in a specified territory, restrictions on commodities which could be moved in any one direction or between designated points would not be justified. The fact that a particular commodity had never been transported between certain points in that territory would not mean that authority to haul it between them should be withheld. Likewise, if the applicant could establish that it was a "common carrier" only of a limited number of commodities, there would normally be no statutory sanction for

limiting the carriage of particular commodities in that group to specified points in the authorized area. Presumptively one who had established his status of "common carrier" would be entitled to carry all of the commodities embraced in his undertaking to all points to which any shipments of any articles were authorized. On the other hand, an applicant's status may vary from one part of the territory to another or be different in northbound shipments than in southbound shipments. Thus in this case the Commission found that practically all of appellee's northbound shipments consisted of cotton yarn, though a few shipments of other commodities such as tires and tubes, asbestos textile products, spools and empty boxes were also made northbound. With the exception of tires and tubes, the Commission authorized the shipments of those products on northbound trips. Assuming that finding to be justified under the tests which we have described, it does not necessarily follow that the northbound destinations of those particular commodities should be restricted to the localities designated by the Commission. Once the common carrier status of appellee had been established as respects those commodities, shipments to any parts of the authorized territory, or to any of the authorized points therein, should have been permitted, in absence of evidence that the appellee as respects carriage between specified points had restricted its undertaking to particular commodities. That problem is clearer in this case as respects southbound shipments. The record is plain that appellee held itself out as being willing and able to carry a wide variety of commodities on its return trips to its home base in North Carolina. And the record shows that it carried many different kinds of articles on those southbound journeys. But the Commission drastically limited its rights in that regard. Thus it was permitted to carry beer from Newark, N. J. to two points in North Carolina but not from Baltimore, Md. In absence of evidence that it had thus limited its undertaking as respects beer, the mere fact that it previously had not carried beer from Baltimore would be immaterial. If it had established by substantial evidence that it was a "common carrier" of beer on southbound trips, it would be entitled to carry it from any of the northern points to any of the southern destinations. For there was no evidence in this case that it had restricted its undertaking as respects beer to shipments from Newark, unless the fact that it had carried beer only from that point is to be conclusive. But to say that that was conclusive or

controlling would be to disregard the natural and normal course of business shown by this record. So far as southbound shipments are concerned, it is plain that a wide variety of articles was transported consistently with appellee's holding out that it would carry any of the articles from any of the points. Appellee's "bona fide operation" may possibly be limited only to those articles actually carried. But where it was actively soliciting whatever it could get at any of the points, it does violence to its common carrier status to make the origin or destination of future shipments conform to the precise pattern of the old. Such a pulverization of the prior course of conduct changes its basic characteristics. There is no statutory sanction for such a procedure.

IV. To appellee such matters involve life or death. Empty or partially loaded trucks on return trips may well drive the enterprise to the wall. A restriction in this case of the commodities which may be carried from any one point on southbound trips is a patent denial to appellee of that "substantial parity between future operations and prior bona fide operations" which the Act contemplates. *Alton R. R. Co.* v. *United States, supra.* Its prior opportunity should not be restricted beyond the clear requirements of the statute. For this Act should be liberally construed to preserve the position which those like appellee have struggled to obtain in our national transportation system. To freeze them into the precise pattern of their prior activities as was done here not only may alter materially the basic characteristics of their service; it also may well be tantamount to a denial of their statutory rights.

The precise grounds for the Commission's determination that only certain commodities could be carried and that only a few could be transported between designated points are not clear. It is impossible to say that the standards which we have set forth were applied to the facts in this record. Hence, as in *Florida* v. *United States,* 282 U. S. 194, 215, the defect is not merely one of the absence of a "suitably complete statement" of the reasons for the decision; it is the "lack of the basic or essential findings required to support the Commission's order." And see *United States* v. *Baltimore & Ohio R. R. Co.,* 293 U. S. 454, 464; *United States* v. *Chicago, M., St. P. & P. R. Co.,* 294 U. S. 499, 510-511. Congress has made a grant of rights to carriers such as appellee. Congress has prescribed statutory standards pursuant to which

those rights are to be determined. Neither the Court nor the Commission is warranted in departing from those standards because of any doubts which may exist as to the wisdom of following the course which Congress has chosen. Congress has also provided for judicial review as an additional assurance that its policies be executed. That review certainly entails an inquiry as to whether the Commission has employed those statutory standards. If that inquiry is halted at the threshold by reason of the fact that it is impossible to say whether or not those standards have been applied, then that review has indeed become a perfunctory process. If, as seems likely here, an erroneous statutory construction lies hidden in vague findings, then statutory rights will be whittled away. An insistence upon the findings which Congress has made basic and essential to the Commission's action is no intrusion into the administrative domain. It is no more and no less than an insistence upon the observance of those standards which Congress has made "prerequisite to the operation of its statutory command." *Opp Cotton Mills, Inc.* v. *Administrator*, 312 U. S. 126, 144. Hence that requirement is not a mere formal one. Only when the statutory standards have been applied can the question be reached as to whether the findings are supported by evidence. That is why we cannot say that the Commission would be justified in placing the same restrictions on the certificate in this case had a correct construction of the Act been taken.

We express no opinion on the scope of the certificate which should be granted in this case. That entails not only a weighing of evidence but the exercise of an expert judgment on the intricacies of the transportation problems which are involved. That function is reserved exclusively for the Commission. *United States* v. *Maher, supra; Alton R. R. Co.* v. *United States, supra.* Our task ends if the statutory standards have been properly applied.

Affirmed.

Mr. Justice JACKSON, dissenting.

Mr. Justice FRANKFURTER and I are unable to agree with this disposition of the case.

It overturns the exercise of a discretion which Congress has delegated to the Interstate Commerce Commission upon grounds

which seem to us so unsubstantial as really to be a reversal on suspicion. The function of determining "grandfather" rights delegated in this case is not unlike the function dealt with in *Gray* v. *Powell*, 314 U. S. —, in which we said that Congress could have legislated specifically as to individual exemptions "but found it more efficient to delegate that function to those whose experience in that particular field gave promise of a better informed, more equitable adjustment of the conflicting interests." We held that this delegation will be respected and that unless we can say that a set of circumstances deemed by the Commission to bring a particular applicant within the concept of the statute "is so unrelated to the tasks entrusted by Congress to the Commission as in effect to deny a sensible exercise of judgment, it is the Court's duty to leave the Commission's judgment undisturbed." While the Court pays lip service to this principle the Commission's decision is upset because, as the opinion states, "We have doubts"; "We are not confident"; and "We are not satisfied." The opinion proceeds as it might do with a burden upon the Commission, although we supposed the burden to be upon those who complain of an administrative decision to satisfy the Court that the decision is wrong—particularly one dealing with an exemption from a general duty.

We do not agree that a remand to the Commission to make specific findings of the kind required in *Florida* v. *United States*, 282 U. S. 194, 215, is appropriate. In the *Florida* case, the Commission undertook to revise intrastate railroad rates under control of the state and over which, as Chief Justice Hughes said, "the Commission has no general authority." 282 U. S. at 212. It was required to support its jurisdiction to revise rates not within its general control by specific findings as to whether those rates in any way constituted a burden on interstate commerce. The Court had earlier established the rule that an order of the Commission should not be given precedence over a state rate statute otherwise valid "unless, and except so far as, it conforms to a high standard of certainty." *Illonis Central R. R. Co.* v. *Public Utilities Commission*, 245 U. S. 493, 510. And in this connection the Court pointed out that even an act of Congress is not to be construed to supersede or suspend the exercise of the reserved powers of the state, even where the Constitution permits, "except so far as, its purpose to do so is clearly manifested." It is one

thing to require the Interstate Commerce Commission to be explicit in finding jurisdictional facts before it invades conceded state power. It is a wholly different thing to read with a hostile eye the Commission's findings that a claim for exemption from conceded federal regulatory authority has not been sustained.

Furthermore, if after this case is returned to the Commission, the Commission should leave no room for doubt that in making the challenged order it acted upon correct notions of law, it may yet be upset because the Court says its findings are not sustained by the evidence, it had better be said now. We have here a small record and simple facts, which are all before us, giving adequate basis for concluding whether these facts as found by the Commission warranted the order. On this record it is plain what the Commission has done. The only question is—Can it do what it has done? To send the case back to the Commission to be reconsidered or to say that it has already been considered in the light of the legal views which the Court expresses, and then, perhaps, to say that in any event the order is not warranted on the record before us, is really to invite the Commission to express abstract views on law. What this amounts to is that the Court refuses to tell the Commission what it thinks about the evidence until the Commission tells what it thinks about the law. We cannot regard this as the most helpful use of the power of judicial review.

Congress by the Motor Carrier Act of 1935 cast upon the Commission the task of regulating the motor carrier industry. By the enactment, Congress asserted that the public interest in the motor carrier enterprise had become paramount to private interests. The highly individualistic nature of the business and the easy terms upon which equipment could be obtained had promoted a quick growth accompanied by intense and uneconomic competition, both within itself and with other transportation systems. It was not expected that a sprawling, chaotic, and cutthroat industry that had developed entirely in the private interest would be reduced to an orderly and regularized system of transportation in the public interest without stepping on a good many individual toes.[1]

In trying to limit the injury caused by transition from a purely private enterprise to a regulated public service industry, the gen-

[1] See Report of Joseph B. Eastman, Federal Coordinator of Transportation, on the Regulation of Transportation Agencies other than railroads. Sen. Doc. No. 152, 73rd Cong., 2nd Sess., p. 13 *et seq.*

See also Report of the Committee on Interstate Commerce on the Motor Carrier Act 1935, Sen. Rep. No. 482, 74th Cong., 1st Sess.

eral plan was to preserve to private owners the transportation values evidenced by actual conditions of operation on June 1, 1935, and to exempt them from meeting the requirements of "public convenience and necessity" as to such operation. Those who obtained such "grandfather" rights are not, however, limited to them. They may expand their territory or extend their service by proving that public convenience and necessity will be served thereby. Thus, the scramble for "grandfather" rights represents the effort to pre-empt territory and service privileges without submitting to the test of the public interest. Public regulation would be defeated at its very outset if the Commission permitted the bulk of the industry to escape the public interest test by inflated claims under the "grandfather" clause. The nature of the general task of reducing the claims of "grandfather" rights to defined and reasonable limits consistent with the plan of public regulation is disclosed by the record in this case.

The motor carrier here asked as a matter of right that the Commission certify its "grandfather" privileges to include the carriage of general commodities in a territory comprising substantially the Atlantic seaboard from South Carolina to Massachusetts. That there was some disparity between its hopes and its experience was indicated by the fact that on June 1, 1935, it was operating eight trucks, and by 1936, the number of usable vehicles had fallen to four. After a change of ownership the number was increased and at the time of hearing the applicant was operating seventeen carrying units.

This carrier did not operate at stated times or over regular routes, but was an irregular route carrier. The backbone of its business consisted of carriage of cotton yarn from points of origin in the South to points of distribution in the North. Incidental to this carriage it was ready to accept cargo of almost any kind to complete its loads and particularly to provide earnings on return trips. If satisfactory terms could be arrived at, it was willing to carry almost anything almost any place. On the basis of such general holdings out this carrier sought certificates that would entitle it as a matter of right to carry nearly everything within the territory described.

The Commission cut down the claims of the applicant by the use of the standard which the Act prescribes: namely, *bona fide* operation as a common carrier by motor vehicle. The Commission re-

duced the territorial claim to that which the carrier actually served with some regularity and lopped off territory which had been served only occasionally or by isol ted trips. It limited the commodities to be carried to those carried in substantial volume during the period before and after June 1, 1935. We find no basis upon which we can say as matter of law that these general methods of reducing nebulous and extravagant claims to a compass which the Commission could properly certify as representing *bona fide* operation are improper or other than those contemplated by the statute.

The Court is "not confident" that the Commission applied to this irregular route carrier the same test as to commodities that is applied to regular route carriers. We cannot be so confidently unconfident. The Commission seems to have made only the distinction between irregular and the regular route carriers that results from the differences inherent in the two types of enterprise. The Commission has tested both by the regularity and substantiality of their actual operations. It is a test with which they may have unequal ability to comply, but to reach different results on such different facts does not imply either the use of different legal standards or discriminatory administration.

The administrators of the Motor Carrier Act must be aware, as the framers of it were, that "the grandfather clause as of June 1, 1935 has been fixed in fairness to *bona fide* motor carriers now operating on the highway and limited so as to prevent speculation which is highly important." Report of the Committee on Interstate and Foreign Commerce, H. R. No. 1645, 74th Cong., 1st Sess., p. 4. When a carrier claims grandfather rights to serve the entire Atlantic seaboard as a general common carrier with equipment consisting on the critical date, of eight trucks, the Commission is obviously forewarned that it must guard against granting franchise privileges that will result in their having a speculative value to the carrier rather than a service value to the public. The Commission was quite right to take the measure of the territory and service of such a claimant and to give him a certificate covering his actual substantial operations. We should not substitute our own wisdom or unwisdom for that of administrative officers who have kept within the bounds of their administrative powers. *A. T. & T. Co.* v. *United States*, 299 U. S. 232, 236.